

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Baxter International Inc.,

Opposer,

v.

Inviro Medical Devices, Ltd.

Applicant.

12-09-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #77

) Opposition No.: 91150298

) Application No. 76/151,380

**OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS  
MOTION FOR ORAL DEPOSITION OF APPLICANT**

Though Baxter realizes that the TTAB does not encourage reply briefs in support of motions, Baxter notes that the TTAB will consider reply briefs in its discretion, when the Board finds that the brief is warranted under the circumstances of a particular case, such as when it is "necessary to permit the moving party to respond to new issues raised in, or new materials submitted with, an adversary's brief in opposition to the motion; or the issue to be determined is complex or needs to be further clarified; or certain arguments against the motion should be answered so as to assist the Board in arriving at a just conclusion on the motion." T.B.M.P. § 502.03. In this case, Baxter believes such criteria are present, and therefore, submits this timely reply brief, in accordance with 37 CFR § 2.127.

Inviro's response brief has made several claims to which Baxter would like to respond: (1) Baxter has been given full and complete discovery responses from Inviro; (2) the cost for Inviro to participate in an oral deposition is too costly; and (3) Baxter filed this motion with the intent of driving up costs and is pursuing Inviro instead of other third party users of LINK marks because Inviro is a smaller and easier target.

**1. Inviro Has Not Provided Any Information.**

Throughout the discovery period, which has now gone on for more than nine months, Baxter has learned nothing about Inviro's intended uses for its ULTRALINK trademark, other than reference to the fact that it hopes to use the mark in connection with the recitation of goods listed in its application. Baxter has learned of no specific marketing plans, revenue goals, intended consumers, or perceived competitors, and has not been provided with internally created documents that might shed light on Inviro's intentions. Inviro has continually stated that no such documents exist and no further information can be provided—that it is a small start-up company, and it just has no concrete plans for its mark, other than to use it for the broad description of goods listed in the recitation. It is clear to Baxter that the only meaningful information to be learned at this point will come from Inviro's witness, Dr. Sharp. Therefore, it is all the more crucial that the deposition occur in a format most likely to produce meaningful information.

**2. The Cost of An Oral Deposition Is Unlikely To Be Much Greater Than Continuing Forward With the Written Deposition Process.**

As Baxter pointed out in its initial Motion, the back-and-forth provided by the rules with regard to the submission of written questions and objections is time consuming—and, hence, costly to both parties. The attorney time involved in reviewing, analyzing, objecting, drafting, and re-submitting further questions to the other party is staggering. In contrast, because Baxter has already prepared its initial written deposition questions, and Inviro has reviewed those, further preparation for an oral deposition is unlikely necessary. The only real cost involved for either side is the airfare to Vancouver and the attorney time for the taking of the deposition. Baxter has already addressed the costs of flights to Vancouver in its initial motion, and the attorney time is no greater, if

not less, than that which would be involved with the continuation of the written deposition practice.

**3. Baxter Is Not Harrassing The Applicant Or Targeting Small Companies To Pursue.**

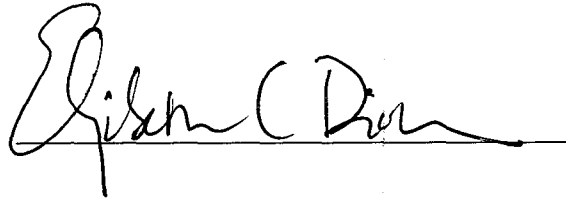
Though Inviro's slanderous claims about Baxter's motivation in filing this motion are hardly worth responding to, this Board should be aware that Baxter is fully aware of the other third parties using LINK marks, and as it has stated to the Applicant on countless occasions, its decision to pursue or not pursue any of those users has been based on the specific goods and services which are being used in connection with the goods—not based on the size of the company at issue. In fact, through discovery, Baxter has provided numerous documents and information to Inviro regarding the many companies Baxter has pursued through oppositions and otherwise over the last ten years in order to protect its proprietary rights in its INTERLINK mark.

Most importantly, though Inviro's response states its withdrawal of certain objections that Baxter pointed out as troubling, Inviro's response does not address one of Baxter's most serious concerns, and that is that Inviro's counsel intends to coach its witness in the answering of all deposition questions, should they occur in writing. As stated in Baxter's initial motion, it is concerned that Inviro's witness will attend its written deposition with pre-written answers and/or notes. Inviro's response brief has not denied that Inviro intends to allow this. There is no way for Baxter to feel confident that it will gain any real insight from the answers provided by Inviro's witness if those answers are, in fact, supplied through and with the direct help of Inviro's counsel. Clearly, counsel for witnesses are allowed to prepare their witnesses, but just as coaching during an oral deposition is not permitted, so should advance coaching be prohibited. As

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of **OPPOSER'S REPLY  
BRIEF IN SUPPORT OF ITS MOTION FOR ORAL DEPOSITION OF  
APPLICANT** was sent on this 4<sup>th</sup> day of December, 2002, via United States Mail, first  
class postage prepaid, to:

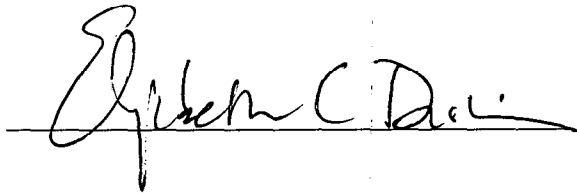
Duane M. Byers  
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1100 North Glebe Road, 8<sup>th</sup> Floor  
Arlington, VA 22202-4714  
Fax: 703-816-4100

A handwritten signature in black ink, appearing to read "Duane M. Byers", is written over a horizontal line.

**CERTIFICATE OF MAILING**

I hereby certify that the **OPPOSER'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR ORAL DEPOSITION OF APPLICANT** is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive, **Box TTAB-NO FEE**, Arlington, Virginia 22202-3513 on December 4, 2002.

Date: December 4, 2002

A handwritten signature in cursive script, appearing to read "Eileen C. Davis", is written over a horizontal line.